No. 5747

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ALEX KUSNIERZ, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

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U.S. GOVERNMENT PRINTING OFFICE: 1929

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STATEMENT OF THE CASE

Alex Kusnierz, hereinafter called the plaintiff, applied for and was granted War Risk Term Insurance in the sum of $10,000 while in the Army in the month of November, 1917. Premiums were paid to include the month of December, 1919, on the $10,000 term insurance. It is stipulated that on $5,000 of term insurance no premiums have been paid since the month of December, 1919. (R. 40, 41.) Effective January 1, 1920, the plaintiff converted $5,000 of term insurance to insurance under the ordinary life plan and on this contract paid

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premiums to include December, 1922. Effective January 1, 1923, the insurance was converted to a contract under the twenty-year endowment plan and premiums thereon were paid to include December, 1927. On the converted contract it is stipulated that the plaintiff borrowed a total of $1,300, which at the time of trial remained unpaid together with interest thereon as provided by the terms of the contract. (R. 42.)

It is alleged in Paragraph III of the complaint (R. 3) that the plaintiff became permanently and totally disabled on December 24, 1917. This allegation was amended by trial amendment at the close of the trial to allege permanent and total disability from October 10, 1918. (R. 81.) This allegation was denied in Paragraph III of the answer. (R. 5.) The answer affirmatively pleaded that the plaintiff was estopped by reason of said conversion to assert a permanent and total disability prior to the date of such conversion. At the close of the plaintiff's case (R. 44) and again at the close of the trial (R. 72) defendant moved for a directed verdict on three grounds:

> (1) That the evidence was wholly insufficient to sustain the plaintiff's allegations of permanent and total disability.
>
> (2) That by reason of the conversion of $5,000 term insurance, effective January 1, 1920, the plaintiff was estopped from asserting a permanent and total disability prior to that date.

(3) That in any event no recovery could be had in this suit on the $5,000 converted insurance.

The court below denied the motion for a directed verdict to which exception was taken. (R. 45, 46, 73.) The case was submitted to the jury and a verdict was returned finding the plaintiff permanently and totally disabled as from October 10, 1918 (R. 9), and judgment on the verdict was entered November 14, 1928 (R. 9, 10, 11). The defendant filed a motion for a new trial. (R. 11.) This motion was denied and exception noted. (R. 13.) From the judgment in favor of the plaintiff the defendant is here on appeal.

ASSIGNMENT OF ERRORS

I

The District Court erred in denying the defendant's motion for a directed verdict at the close of the plaintiff's case, which motion for directed verdict was interposed on the following grounds:

The evidence is wholly insufficient to sustain the allegations of the complaint in that no medical evidence or other evidence was adduced which shows that the condition of the plaintiff was permanent prior to at least 1924, and all of the evidence thereof shows he was not totally disabled from the date of his discharge from the service or the date alleged in the complaint; and on the further grounds that—

The plaintiff, effective on January 1st, 1920, effected a conversion of $5,000 of his term insurance

into an ordinary life insurance contract, and that by reason thereof the plaintiff is estopped from asserting permanent total disability prior to the date of such conversion; and thereafter he is not entitled to recovery upon the original term insurance contract;

To which denial the defendant took a separate exception to each ground at the time of the trial herein.

II

The District Court erred in denying the defendant's motion for a directed verdict at the close of the entire testimony, which motion for directed verdict was interposed on the same grounds as the defendant's motion for a directed verdict at the end of the plaintiff's case.

To which denial the defendant took separate exception to each ground at the time of the trial herein.

III

The District Court erred in refusing to give Defendant's Requested Instruction No. 7, which requested instruction was as follows:

> You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk term insurance for the reason that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an Ordinary Life Govern-

ment converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder.

IV

The District Court erred in entering judgment upon the verdict herein, when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment.

PERTINENT STATUTES AND REGULATIONS

Section 400 of the Act of October 6, 1917 (40 Stat. 409):

> That in order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Section 402 of the Act of October 6, 1917 (40 Stat. 409):

> That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

Section 13 of the Act of October 6, 1917 (40 Stat. 398, 399):

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes. * * *

Total permanent disability under this contract is defined by Treasury Decision No. 20 W. R., a regulation promulgated under and pursuant to statutory authority. It provides:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid,

> as provided in Article IV, on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

Regulations of the Bureau, promulgated pursuant to statutory authority, have the force and effect of law and the court will take judicial notice thereof. (*Cassarello* v. *U. S.*, 279 Fed. 396, C. C. A. (3rd); *Sawyer* v. *U. S.*, 10 Fed. (2d) 416, C. C. A. (2nd).)

Section 404 of the Act of October 6, 1917 (40 Stat. 410):

> * * * Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and into other usual forms of insurance * * *.

ARGUMENT

Point I

The evidence was wholly insufficient to sustain the plaintiff's allegations of permanent and total disability

To sustain the allegations of permanent and total disability it was necessary for the plaintiff to establish by a fair preponderance of the evidence that during the life of the $10,000 term insurance contract he was totally and permanently disabled within the meaning of this contract. See Treasury

Decision 20 (brief, page 6). That is, plaintiff must prove that he was suffering from a disability of mind and/or body which rendered it *impossible* for him to follow continuously an occupation sufficient to support him in his station in life and that such disability was *then* (October 10, 1918) of such a nature as to make it reasonably certain that he would be so disabled through the remainder of his lifetime.

An analysis of the testimony offered to carry this burden shows that the plaintiff not only was not totally and permanently disabled on October 10, 1918, nor at any time prior to January, 1920, but that he was neither totally disabled nor permanently disabled. (Bill of Exceptions, R. 22–42.)

Plaintiff's first witness, Thomas E. Henehan, Superintendent of the Seattle Frog and Switch Company, testified (R. 22, 23, 24) to no more than that:

> Plaintiff worked for me around the shop, running the drill, press, riveting, assembling, etc., right after the War in 1918 and 1919. The work he did was neither light nor heavy but medium. I did not notice anything about the plaintiff's physical condition. I had direct supervision over the plaintiff and I saw him at his work. He would have to do a little lifting and riveting required quite a little effort. He was a good riveter. *His work was satisfactory. He was steady on the job eight hours a day.* He worked two or three months in 1918, and while I don't recall,

he may have worked about eight months in 1919.

The second witness, John Kusnierz, who is a brother of the plaintiff, testified (R. 25, 26) in substance:

> I worked with the plaintiff at the Seattle Frog and Switch Company. I saw him work there, but I do not remember how he performed his work. He put in a full eight hours a day. I don't know how long he worked there, but he worked *quite a while in 1918 and 1919.*

The next witness, Mrs. John Kusnierz, a sister-in-law of the plaintiff, testified (R. 26, 27) in substance:

> After he came home from work at the Seattle Frog and Switch Company he had supper and went to bed. *I think* he was tired. I really don't know or remember much about it. I am simply guessing.

The plaintiff himself testified (R. 37, 38, 39, 40) in substance:

> I went home after I was discharged. I was at my brother's for a while; then I went to work for Mr. Henehan either the last part of 1918 or early part of 1919. I had trouble with my chest and nervousness and trouble to sleep. I knew the work was too heavy for me. I could not sleep. I took care of the tools, sharpening drills and dressing them and keeping them ready to go to work. A new foreman put me on heavier work and

I got sick right quick. It was too heavy; that is why I quit.

On cross-examination plaintiff said:

While I was in service I was in the hospital for an operation for my neck and I had pneumonia. As far as I know I got well from the pneumonia and went to work for the Seattle Frog and Switch Company doing part machine work and part sanding frogs and switches. I was required to handle hammers and some riveting work. I put in eight hours a day. I was paid $5 a day. I don't remember how many weeks I worked. The next job they gave me was taking care of the tools; sharpening drills and dressing them and keeping them ready to go to work. *I could work at the light work all right.* I entered vocational training for about a year or a year and four months in the fall of 1919. First I went to the tool room learning the names of the different tools and instruments. I would hand the tool when it was called for. Later I did some of the work a machinist is supposed to do. I used some of the machines that were there. That was required as part of my training. I had to do so much of it every week. *I put in eight hours a day while I was going to school.*

In addition to the foregoing the plaintiff offered certain medical testimony. The first medical witness, Dr. E. F. Ristine, testified (R. 27, 28, 29, 30) in substance:

> I examined the plaintiff on the 18th day of October this year. From examination and observation so far made, I am unable to tell whether he has tuberculosis, or infection of pneumonia, or what. He has some heart trouble and a nervous condition which we classify as neurasthenia. I haven't seen him long enough to say to what extent this condition would disable him. I would not want to state to this jury as to the degree of this man's disability prior to the time I examined him; that is, prior to October 18, 1928.

The next medical witness, Dr. Donald V. Trueblood, testified (R. 30, 31, 32) in substance:

> I first saw the plaintiff in 1926 and at that time the plaintiff complained of dizziness, headache, and nervousness. I concluded that he had some disease of the labyrinth; that is, the semicircular canal connected with the middle ear. It is hard to say whether that condition is going to be permanent or not. That is the only disability I found. I would not want to state as to the degree of his disability prior to my examination.

The next medical witness was Dr. Frank T. Wilt, who testified (R. 33, 34, 35) in substance:

> I first saw the plaintiff November 6, 1924. My diagnosis was traumatic neurosis resulting from an injury, the plaintiff having told me that he was in an automobile accident in December, 1917. I can not tell what caused his condition. While I think he has been totally and permanently disabled since I

> have known him, *I would not want to state as to the degree of his disability prior to the time I examined him.*

Where in all of the foregoing testimony is there any evidence which shows that the plaintiff on October 10, 1918, or at any time prior to January 1, 1920, *had an impairment of mind or body which rendered it impossible for him to continuously carry on a substantially gainful occupation?* Where is there any testimony to show that if he was so disabled that it was founded upon conditions *which rendered it reasonably certain that it would continue throughout his life?*

The medical witnesses, whom it must be admitted are better qualified and in a better position to hazard an opinion as to what, if any, impairment of mind or body the plaintiff had prior to their examinations, refused without exception to venture such an opinion or to hazard such a guess. The non-medical witnesses who testified for the plaintiff not only did not show that the plaintiff suffered an impairment of mind or body which prevented him from engaging in gainful employment, but, on the contrary, definitely stated that the plaintiff did work, that he did engage in gainful employment for a period of eight or ten months, and the plaintiff himself testified that while it was difficult for him to engage in *heavy* work, he could and did engage in the *lighter* work given him at the Seattle Frog and Switch Company; that he received $5 a day for his work; that this continued for eight or

ten months in 1918 and 1919, and that following that he was engaged in vocational training, successfully carrying on the same kind of work.

The contract here under consideration is matured if the plaintiff *can not* work, not if he *does not* work, and a verdict finding this man permanently and totally disabled from October 10, 1918, or from any other date prior to January 1, 1920, is reached only after delving deep into the realms of conjecture.

On the evidence offered by the plaintiff in this case the Court should have as a matter of law directed a verdict for the defendant.

In the case of *Interstate Compress Co.* v. *Agnew,* decided by the Circuit Court of Appeals for the Eighth Circuit, and reported in 276 Fed. 882, 887, it is stated:

> The rule in these courts (Federal Courts) is that in each case tried by a jury the question of law always arises at the close of the evidence whether or not there is such substantial evidence of the plaintiff's cause of action as will sustain a verdict in his favor and warrant the trial court in refusing in the exercise of its judicial discretion to set a verdict in his favor aside if rendered, and any evidence, a scintilla of evidence is not sufficient to warrant such a refusal. This question of law arises on a request for a peremptory instruction made before the case goes to the jury. The jurisdiction is conferred and the duty is imposed upon the trial court to decide it and, on exception, upon the appellate court to review that decision.

> The jury has no jurisdiction of this issue of law, and its verdict after the trial court has decided it does not deprive the appellate court of its jurisdiction or relieve it of its duty to review its decision by the trial court.

In the case of *United States of America* v. *Donald McPhee* (C. C. C., 9th Circuit, No. 5635), decided March 11, 1929, this Court, after reversing the judgment of the Trial Court, for other reasons, says:

> In view, however, of another trial, we deem it proper to say that in our judgment the motion for a directed verdict was ample to challenge the sufficiency of the evidence, and should have been sustained.
>
> We can find no evidence in the record showing or tending to show that the appellee was totally and permanently disabled at any time before the policy expired. * * *
>
> Total and permanent disability within the meaning of a war-risk insurance policy does not mean absolute incapacity to do any work at all. *But there must be such impairment of capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation, and this must occur during the life of the contract.* (Italics ours.)
>
> War-risk insurance is not a gratuity but an agreement by the Government, on certain conditions, to pay the assured certain sums per month if he becomes totally and permanently disabled while the contract of insurance is in force. The burden is on one suing on such a contract to show that he was

> in fact permanently and totally disabled at some time before the contract lapsed.

In *Northern Pac. Ry. Co.* v. *Jones,* 144 Fed. 47, 52, the Court says:

> Where from any proper view of the undisputed or established facts, the conclusion follows as a matter of law that the plaintiff can not recover, it is the duty of the trial court to direct a verdict. (Cases cited.)

In *Commissioners, Etc.,* v. *Clark,* 94 U. S. 278, 284; 24 L. Ed. 59, 61, the Court says:

> Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

While it seems apparent that the plaintiff wholly failed to make a prima facie case, there can be no doubt as to the error of the Court in giving the case to the jury after hearing the defendant's evidence.

The first witness for the defendant, U. M. Henehan, testified (R. 49) in substance:

> The plaintiff started to work for the Seattle Frog and Switch Company October 26,

1918, and worked from that date to July 19, 1919. During all this time he received pay at the rate of $5 per day, and the first week he worked five days; the next week every day; the next week one day; the next week four days; the next week he did not work; the next week four days; the next week five days; the next week six full days, together with overtime; the next week every day; the next three weeks five days each week; the next week every day; the next week five days; the next four weeks every day; the next week five days; the next week six days; the next week five days; the next week every day, plus overtime; the next week every day; the next week five days; the next six weeks every day each week; the next two weeks five days each week; the next week six days; the next week five and one-half days; the next week six days; the next two weeks five days each week; and the last week one day, which was the end of his employment with this Company.

The next witness for the defendant, Dr. Adolph Bronson, testified (R. 52) in substance:

I examined the plaintiff April 16, 1919, and found an enlargement of the heart. I treated him on February 15, 1919, and saw him three or four times for inflammation of the right ear. This ear condition cleared up under treatment at the end of two weeks. I believe at the time he was able to do light work.

The next witness for the defendant, Dr. A. D. Tollefsen, testified (R. 53, 54, 55) in substance:

> I examined the plaintiff in February, 1925, and my diagnosis was no cardiac pathology. From the condition of the plaintiff's heart there was no reason why he should not have been following some gainful occupation.

The next witness for the defendant, Dr. A. C. Feaman, testified (R. 55) in substance:

> I examined the plaintiff on May 21, 1928. I examined his lungs and heart. I found his lungs negative—that is, no evidence of any lung pathology. The heart condition showed no evidence of any heart disease. I found nothing that would prevent him from following some substantially gainful occupation.

The next witness for the defendant, Dr. I. A. Dix, testified (R. 56) in substance:

> I examined the plaintiff on May 21, 1928. I made a general physical examination and referred him to a specialist for examination of the ears and heart. I only found flat feet, bilateral, second degree, with no objective symptoms that would be disabling. I would not say that he was in such condition, that he was of such disability, that he could not follow some substantially gainful occupation.

The next witness for the defendant, Dr. William E. Joiner, testified (R. 57) in substance:

> I examined the plaintiff's eyes November 3, 1919. I specialize in diseases of eye, ear, nose, and throat. On March 1, 1920, I ex-

amined the plaintiff's ears. The plaintiff complained about noises in the right ear; by that I mean inflammation of the ear, *which came on suddenly.* The plaintiff stated the ear was punctured at that time. That would be an acute *abscess.* I examined him again in November and December of 1920, and in February of 1921. While he still complained of ringing or buzzing in the ear, *I found his ear normal.* I examined him again in February and November of 1923, and while he still complained of buzzing, his hearing was normal. I examined him again on May 21, 1928, and his hearing was normal except on the watch test.

The next witness for the defendant, Dr. A. J. O'Leary, testified (R. 59, 60) in substance:

I examined the plaintiff in June, 1928. I specialize in nervous and mental diseases. I made a diagnosis of neurasthenia. I would consider his neurasthenia as secondary to a toxic goitre for which he had been previously operated on. I would say he could follow some light occupation.

The next witness for the defendant, Dr. G. O. Ireland, testified (R. 62) in substance:

I examined the plaintiff on October 24, 1923, to determine whether or not he had any nervous or mental disease. My conclusion of a metal test made was that there was no psychosis present, and from the evidence in the neurological test there was a neurasthenia present. There was certainly no organic

> condition. I would not say from my examination and observation of him that he could not follow a gainful occupation. When I say gainful occupation for the plaintiff I do not mean one that would be a gainful occupation for me. I doubt if I could get along on what he could make, but according to his own information he was sending money home to Poland. Therefore, I think his occupation was to a certain extent gainful.

The defendant then called two lay witnesses (R. 67, 69) who testified that in 1926 and 1927 that they engaged in certain business dealings with the plaintiff, more or less in the nature of partnerships, wherein they furnished the materials and the plaintiff *furnished the work.* In rebuttal the plaintiff was called on his own behalf (R. 72) and admitted in engaging in truck gardening, etc., as late as 1927. He testified that he did not have a man assisting him at all times, but did hire help to do the cultivating and plowing. He further testified that he did not make a profit on this venture.

Drawing from this evidence every inference favorable to the plaintiff which might be drawn therefrom, it is submitted that the conclusion must be reached that the plaintiff was neither totally nor permanently disabled on October 10, 1918, nor any date prior to January 1, 1920. The plaintiff himself admitted engaging in truck gardening as late as 1927. It is immaterial that from this venture he did not make a profit, for that is one of the risks

which he as well as any other person going into business must assume. As the Trial Court said in this case in instructing the jury (R. 77):

> The amount of gain is not so material, except that the pursuit of the endeavor must be one tantamount to a substantially gainful employment.

Under these circumstances there was no question to submit to the jury and the Court should have directed a verdict for the defendant.

In the case of *Midland Valley R. Co.* v. *Fulgham,* 181 Fed. 91, 95, the Court states:

> Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action * * * is indispensable to the maintenance of a verdict sustaining it. (Cases cited.)

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 524; 69 L. Ed. 419, 422, the Supreme Court says:

> Many decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.

In the case of *Pleasants* v. *Fant,* 22 Wall. 116, 123; 22 L. Ed. 780, 783, the Supreme Court of the United States said:

> It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.
>
> In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial.

Point II

By reason of the conversion of $5,000 term insurance effective January 1, 1920, the plaintiff was estopped from asserting a permanent and total disability prior to that date

In his complaint plaintiff asserted that he applied for a policy of War Risk Term Insurance in the sum of $10,000 and thereafter there was deducted monthly from his pay the sum of $6.10 as premiums for said insurance. That plaintiff was discharged from the service on October 10, 1918. (R. 2.) The answer filed in behalf of the Government affirmatively pleaded that, effective January 1, 1920, plaintiff converted $5,000 of his term insurance to an ordinary life policy and paid premiums thereon to include December, 1922. That effective January 1, 1923, he converted his ordinary life policy into a twenty-year endowment policy and paid premiums thereon to December, 1927. That at the time of conversion no reference was made to the remaining $5,000 term insurance, and no premiums were paid thereon and that this portion of the term insurance lapsed for nonpayment of the premium due January 1, 1920. That by reason of the conversion as aforesaid plaintiff represented that he was not totally and permanently disabled prior to that date, and that plaintiff was estopped to assert that he became totally and permanently disabled prior to January 1, 1920. (R. 5, 6.) The reply filed by the plaintiff admitted that said conversions and reinstatements were made, but alleged that such con-

versions and reinstatements were necessary to protect plaintiff's policy of War Risk Insurance and on the further representations that such conversions and reinstatements would in no way affect the recovery of his original policy of War Risk Insurance. (R. 8.)

It was stipulated (R. 40) that plaintiff applied for and was granted $10,000 War Risk Term Insurance; that during the time plaintiff was in the military service premiums were deducted from his service pay, and that thereafter the premiums were paid on said $10,000 term insurance to December, 1919; that, effective January 1, 1920, plaintiff converted and merged $5,000 of the term insurance to an ordinary life insurance converted policy, on which premiums were paid to include December, 1922 (R. 41); that, effective January 1, 1923, the plan of insurance was changed from an ordinary life insurance converted policy to a 20-year endowment converted policy, on which premiums were paid to include December, 1927; that the United States Veterans' Bureau loaned on the 20-year endowment Government insurance policy the sum of $300 on November 15th, 1927, and the further sum of $1,000 on December 31, 1927, both of which said loans are unpaid, together with interest thereon at the legal rate (R. 41, 42). That no premiums were paid on the remaining $5,000 term insurance from and after January 1, 1920. (R. 41.) At the close of plaintiff's case defendant moved for a directed verdict on the ground, among others, that

by conversion of his insurance on January 1, 1920, plaintiff is estopped from asserting a permanent and total disability prior to the date of such conversion, and that thereafter he is not entitled to recovery upon the original term insurance contract. (R. 44.) This motion was denied by the court and an exception noted to such ruling. (R. 44, 45, 46.)

The plaintiff in the present action based his right of recovery on his $10,000 yearly renewable term insurance contract. The pleadings and the stipulated facts show that this contract came into existence in November, 1917, and remained in existence by virtue of payment of premiums until December 31, 1919, only. The facts stipulated clearly show that plaintiff converted $5,000 of his insurance on January 1, 1920, and never thereafter paid any premiums on the remaining $5,000 insurance. The defendant urged upon the court that the plaintiff was barred from asserting a permanent and total disability prior thereto, as a basis of laibility under his original $10,000 yearly renewable term insurance contract.

The pertinent statutes above quoted for the convenience of the court clearly show that Congress made provisions for insurance protection available to those in the military or naval service; that this insurance protection might be accepted or rejected at the option of each individual member of the military or naval forces; that if accepted the applicant for insurance must not only make applica-

tion therefor but must also pay premiums thereon so long as such protection was desired, and that premiums must be paid thereon both during and subsequent to military service; that each insured should have a right to convert yearly renewable term insurance into other usual forms of insurance, and that the contract of insurance afforded protection against permanent and total disability or death when occurring during the lifetime of the contract of insurance only. (Section 404, Brief p. —.)

War Risk Insurance, like every other kind of insurance, is essentially an indemnity against a future loss. It could not be granted to an individual who was permanently and totally disabled any more than it could be granted to one who had previously died. As a basis of entering into such contract it must be assumed by both parties that the contingencies to be insured against have not already occurred. It is unnecessary to cite any of the numerous authorities to show that an insurance contract is void when there is no risk which can be insured against and that in such contingency money paid as premium is unearned and must be refunded to the insured. As stated above, total permanent disability is one of the contingencies insured against in the contract of War Risk Insurance. Plaintiff by requesting conversion of his yearly renewable term insurance at least impliedly represented that he was not permanently and totally disabled in his application for conversion of $5,000 insurance. The Gov-

ernment was required under the provisions of Section 404 (Brief p. 7) to grant conversion on application without medical examination. Moreover, Section 400 (Brief p. 5), limited the amount of insurance which might be granted to any one individual to $10,000. As the plaintiff prior to January 1, 1920, was carrying $10,000 term insurance, it is obvious that his right to a War Risk Insurance had been fully exercised and that the ordinary life policy for $5,000 insurance, issued to him February 1, 1920, could only be issued as a substitution of $5,000 of his term insurance. If the insured had become permanently and totally disabled prior to that date, his insurance would have matured and there would have been nothing left to convert. The fact that the Government had no right to require a medical examination prior to conversion does not in any way suspend or nullify the basic proposition that the Government could not issue insurance to one who was permanently and totally disabled, but it must have been assumed by both the plaintiff and the Government as a basis of converting $5,000 of the yearly renewable term insurance that plaintiff was not permanently and totally disabled, and plaintiff is now estopped to deny the fact assumed.

In considering the effect of conversion of War Risk Insurance the Attorney General in an opinion dated January 4, 1921 (32 Ops. Atty. Gen. 379, 386, 389, 390) said:

> The term policy having matured into a claim by the happening of the event insured

against it ceases to constitute "insurance."

To concede that one totally and permanently disabled may convert term insurance into a new form of insurance would be to admit that one similarly disabled might take out term insurance, and that, as I have heretofore stated in my opinion of July 18, 1919 (31 Ops. Atty. Gen.) he may not do. I there stated "what is provided for is a contract of insurance against something that may happen and not of indemnity for something which has already happened." * * * And there is nothing in the statute indicating that Congress intended that claims which may have resulted from either the death or the total permanent disability of the insured should be converted. It is "insurance" that is made convertible. * * * But where, as in question 4, a soldier protected by term insurance, who has suffered disability which has been rated by the Bureau of War Risk Insurance as less than total permanent, applies for conversion, and same is granted, the conversion is good, for thereafter the soldier will be estopped from claiming, and the War Risk Insurance Bureau will be estopped from finding *as a fact* that at the time of conversion the applicant for conversion was totally and permanently disabled and therefore ineligible for same. * * * The applicant who applies for conversion knowing that he is permanently and totally disabled will be held to have done so with knowledge of the limitation of the authority of the Bureau to grant converted insurance, and ignorance of

> the law will constitute no excuse for his act. *Whiteside et al.* v. *United States,* 93 U. S. 247, 257.

In the case of *William M. Stevens* v. *United States,* decided by the United States Circuit Court of Appeals for the Eighth Circuit December 14, 1928, No. 7990, the Circuit Court, affirming the ruling of the trial court in holding that the reinstatement of insurance estopped the plaintiff from asserting a permanent total disability prior to such reinstatement, said:

> * * * At that time the question of permanency of injury, if thought of at all, was speculative merely. The Bureau had never so rated the applicant, nor had any medical examiner, so far as appears from the record. Dr. Reed, a specialist in orthopedic surgery, and in the employ of the United States Veterans' Bureau from 1920 to 1924, called as a witness on behalf of plaintiff in error, testified that the applicant had been examined by him, and under his directions, a number of times, beginning in 1921. During this time an operation was performed by Dr. Diessler which had some beneficial effect upon the knee. The report made was the following: "Disability: Over 10%. Total temporary, due to service. This patient is unable to assume duties for two or three months yet, and he should be under observation and instructed to report back not later than two months. He will later be fit for vocational training." Other examinations were made

by Dr. Reed, and his knowledge of plaintiff in error and of his condition continued between April, 1921, and October, 1924. This trial began March 15, 1927. Dr. Reed made a further examination of plaintiff in error on March 12th. His conclusion at that time was that Stevens was suffering from traumatic arthritis in knee and spine with accompanying hysterio neurasthenia. He reached this conclusion in the light of his present knowledge and said: "At no time did I think he was totally disabled until the present time." Other medical examiners introduced by plaintiff in error were of opinion that at the time of trial the disability was total and permanent. Their testimony goes no further than that. The court being of opinion that the policy was reinstated upon the agreed basis that the insured at the time was not permanently and totally disabled; that upon that basis it constituted a new contract between the parties; that this contract had never been repudiated, and that plaintiff in error was estopped to deny this basic fact so long as the contract stood, in the absence of fraud, accident, or mistake, granted a motion to dismiss the case. * * *

The record convinces that plaintiff in error, without fraud, deceit, misrepresentation, or undue influence, elected to have his insurance reinstated upon the terms specified in the act permitting reinstatement. To that end, the fact that he was not at that time totally and permanently disabled was assumed. Neither he nor any officer of the

> government at that time viewed his disability as permanent. At the time his application was made his recourse against the government under his certificate of war risk insurance, which had lapsed for nonpayment of premiums, was at least problematical. * * * It could not be pleaded in defense that plaintiff was permanently and totally disabled prior to the date of reinstatement. We think under the facts before us, and the law applicable thereto, that plaintiff in error is estopped to recover upon his original certificate on the ground of total permanent disability sustained while that certificate was still in force. Judge Bourquin, in the District of Montana, in *Wills* v. *United States,* 7 Fed. (2d) 137, reached this same conclusion.

The decision of the Court of Appeals for the Eighth Circuit in the *Stevens case* is peculiarly applicable to the case now under consideration. It may be said to be substantially on all fours with the present case. The chief disability in both cases is alleged to be a nervous disease. The physicians who examined the plaintiffs in both cases refused to venture an opinon as to the permanency of plaintiffs' disabilities at the times of their examinations. In both cases a new contract was brought into existence. The conversion of insurance brings into existence a new contract of insurance none the less than a reinstatement of lapsed insurance.

It follows that the Trial Court erred in refusing to hold that plaintiff by conversion on January 1,

1920, was estopped from asserting a permanent total disability on October 10, 1918, or at any time prior to the date of such conversion.

Point III

In any event, no recovery could be had in this suit on the $5,000 converted insurance

At the close of plaintiff's case defendant requested the court for certain instructions, among which was the following (R. 48, 49):

Requested Instruction No. 7

> You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk Term Insurance for the reason (48) that it is undisputed that effective January 1, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder.

As heretofore suggested, the maximum amount of insurance which the plaintiff could carry under the limitations of Section 400, *supra,* was $10,000. By conversion of $5,000 insurance, effective February 1, 1920, plaintiff did not and could not secure an aggregate of $15,000 insurance. The converted

insurance for $5,000 secured on January 1, 1920, was retained by the insured until January 31, 1923, at which time his $5,000 ordinary life insurance was changed to a 20-year endowment policy for the same amount, which said policy was in full force and effect (R. 40, 41) subsequent to the time the present action was instituted (R. 7). There is no suggestion that the 20-year endowment policy, which plaintiff now carries, is void or that the plaintiff has surrendered the same, or that the same has been or can be canceled by the Government. There can be no doubt as to the statutory authority of the Bureau to convert term insurance into some other usual form of insurance and there can be no doubt but when converted insurance is issued to an individual having $10,000 War Risk Insurance, as in the present case, the converted insurance is substituted for a like amount of term insurance and that by such substitution a novation is effected which merges all rights and liability under the term insurance in and under the converted contract of insurance. After conversion the rights of the insured, if any, can only exist under the converted insurance contract. No rights can subsequently be asserted under the contract of term insurance; at least unless and until the converted policy has been canceled and the term policy restored. Whether the cancellation of the converted policy and the restoration of the term policy can ever be effected need not be considered here. The fact is that no attempt to effect such an arrange-

ment has even been made. Under these circumstances it is obvious that the court should have given Instructions No. 7, *supra,* and held that if entitled to recover at all in the present action, which was founded upon plaintiff's yearly renewable term contract of insurance, plaintiff could not recover except on the $5,000 term insurance which had not been converted. The trial court clearly erred in entering judgment on the verdict of the jury for the installments payable on $10,000 insurance.

For the reasons above set forth it is submitted that the Trial court erred and that the judgment entered herein should be reversed.

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